

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

MICHAEL V. CASALI,
DIANE L. KLIPFEL,
Appellants,

v.

DEPARTMENT OF THE TREASURY,
Agency.

DOCKET NUMBERS
CH-1221-96-0936-A-1
CH-1221-96-1020-A-1
CH-0752-96-1021-A-1

DATE: APR 21 1999

Gail M. Dickenson, Esquire, Dallas, Texas, and Stephen Gardner, Esquire,
Dallas, Texas, for the appellants.

Eleanor R. Loos, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 These consolidated attorney fee cases are before the Board upon both the appellant Klipfel's timely petition for review and the agency's timely petition for review of the administrative judge's December 18, 1997 addendum initial decision's attorney fee award. The Board GRANTS both petitions for review under 5 C.F.R. § 1201.115, AFFIRMS the administrative judge's findings with respect to the issues of the existence of attorney-client relationships in these

appeals and the reasonableness of the hourly billing rates charged, REVERSES the administrative judge's findings with respect to the reasonableness of the claimed hours expended in these cases and the claimed costs, and REMANDS the cases to the Central Regional Office for readjudication of the reasonableness of the claimed hours expended in these cases and the claimed costs, for further adjudication of appellant Klipfel's motion for attorney fees, and for the issuance of a supplemental consolidated addendum initial decision consistent with this Opinion and Order.

BACKGROUND

¶2 On August 22, 1996, appellant Casali, a GM-14 Supervisory Criminal Investigator with the Bureau of Alcohol, Tobacco and Firearms (ATF), Chicago, Illinois, filed a request for a stay of the agency's removal action against him. Casali Stay Request File, Tab 1. Concurrently with the filing of the stay request, appellant Casali also filed an individual right of action (IRA) appeal contending that the agency threatened, proposed, and took certain personnel actions against him based on his protected disclosures and that he was seeking corrective action. Casali Appeal File (AF), Tab 1. In a September 5, 1996 order, the administrative judge granted appellant Casali's stay request. Casali Stay Request File, Tab 2. In a February 28, 1997 initial decision, the administrative judge granted appellant Casali's request for corrective action. Casali AF, Tab 51. The agency petitioned for review of the initial decision but withdrew its petition for review after the parties entered into a settlement agreement that provided, inter alia, for the agency's withdrawal of its petition for review and its payment of "reasonable attorney fees, expenses and costs incurred by [the] appellant in this appeal in accordance with 5 U.S.C. [§] 1221(g)." Casali Petition for Review File, Tabs 3-4. Accordingly, in a June 3, 1997 Order, the Board dismissed the petition for review as settled. *Id.*, Tab 5. Appellant Casali's attorney of record in his appeal was Gail M. Dickenson.

¶3 On September 20, 1996, appellant Klipfel filed an IRA appeal from the agency's September 6, 1992 action suspending her for 7 days from her GM-14 Supervisory Criminal Investigator position with the ATF, Oak Brook, Illinois, and an adverse action appeal of her September 12, 1996 removal from her position. The administrative judge joined the two Klipfel appeals for adjudication. Klipfel Suspension AF, Tabs 1, 5; Klipfel Removal AF, Tabs 1, 7. Prior to a decision on the merits of these appeals, the parties entered into a settlement agreement that provided, inter alia, that the agency would cancel appellant Klipfel's suspension and removal actions, reinstate her to federal service, and, as in the case of appellant Casali, would "pay reasonable attorney fees, expenses, and costs incurred by [the] appellant in these appeals in accordance with 5 U.S.C. [§] 1221(g)." Klipfel Suspension AF, Tab 6; Klipfel Removal AF, Tab 50. Thus, in a May 5, 1997 initial decision, the administrative judge dismissed the appeals as settled. Klipfel Suspension AF, Tab 7; Klipfel Removal AF, Tab 51. The appellant Klipfel's attorneys of record in these appeals were Stephen Gardner and Dickenson.

¶4 Following the dismissal of the agency's petition for review in the Casali appeal and the dismissal of the Klipfel appeals as settled, counsels for the appellants, Dickenson and Gardner, as well as attorney Sally Saltzberg of the law firm of Loftus & Saltzberg, P.C., and attorney Kathleen Kubicki, filed motions for attorney fees and costs in these appeals. Casali Addendum File, Tabs 1-2, 4-6, 8, 10; Klipfel Addendum File, Tabs 1, 3-4, 6. The agency objected, inter alia, to the reasonableness of the attorney fees and costs requested. Casali Addendum File, Tab 9.

¶5 In the addendum initial decision, the administrative judge found that the appellants were the prevailing parties and that the settlement agreements provided for an award of attorney fees. He then determined the reasonableness of the attorney fees requested by each attorney and ordered the agency to pay them

attorney fees and costs as follows: \$17,226 in attorney fees plus \$119.60 in costs (\$17,345.60) to attorney Saltzberg; \$24,940 in attorney fees plus \$1,513.16 in costs (\$26,273.72) to attorney Kubicki; \$323,100 in attorney fees plus \$21,086.91 in costs (\$344,186.91) to attorney Dickenson; and \$67,260 in attorney fees plus \$10,418.09 in costs (\$77,678.09) (*see* Casali Addendum File, Tab 18) to attorney Gardner. The administrative judge also ordered the agency to pay \$6,967.90 in reimbursable expenses to appellants Casali and Klipfel (who, he indicated, are married). Addendum Initial Decision (AID) at 2-8.

¶6 On petition for review, appellant Klipfel contends that the administrative judge erred by inadvertently failing to address her request for attorney fees and costs she incurred for legal services rendered by attorney Dickenson in her appeals. Petition for Review (PFR) File, Tab 4. The agency has timely responded in opposition to appellant Klipfel's petition for review. *Id.*, Tab 6. The agency has also filed a petition for review, contending that the amount of attorney fees awarded below to the individual attorneys was unreasonable, the costs awarded were unreasonable, and the administrative judge's award of fees to attorneys who never entered an appearance in the appeals, attorneys Saltzberg and Kubicki, was contrary to the terms of the settlement agreements. *Id.*, Tab 5. The appellants have timely responded in opposition to the agency's petition for review. *Id.*, Tab 7.

ANALYSIS

¶7 Generally, in order to be entitled to an award of attorney fees, an appellant must show that an attorney-client relationship exists pursuant to which counsel rendered legal services on the appellant's behalf in connection with a Board proceeding, that the appellant was the prevailing party, that an award of attorney fees is warranted in the interest of justice, and that the fees requested are reasonable. 5 U.S.C. § 7701(g)(1); *Mullins-Howard v. Office of Personnel Management*, 71 M.S.P.R. 619, 625 (1996). It is well settled, however, that

parties before the Board may provide for attorney fees under the terms of a settlement agreement. *See, e.g., White v. U.S. Postal Service*, 40 M.S.P.R. 23, 25-26 (1989); *Steele v. Department of the Army*, 39 M.S.P.R. 139, 139-41 (1988).

¶8 Here, the settlement agreements do not explain the term "reasonable attorney fees." Because, however, the parties entered the settlement agreements into the record for enforcement purposes and brought the matters before the Board for determination of the reasonableness of the fee award, relying on Board cases, it is clear that they have adopted the Board's standard of reasonableness. *See Montreuil v. Department of the Air Force*, 55 M.S.P.R. 685, 690 (1992); *Steele*, 39 M.S.P.R. at 139-41.

¶9 The Board assesses the reasonableness of an attorney fee request by utilizing two objective variables, the customary billing rate and the number of hours reasonably devoted to the case. In order to establish the appropriate hourly rate, the attorney fee application must be accompanied by a copy of the fee agreement, if one exists, as well as evidence of the attorney's customary billing rate for similar work. The customary billing rate may be established by showing the hourly rate at which the attorney actually billed other clients for similar work during the period for which the attorney seeks fees, or, if the attorney has insufficient billings to establish a customary billing rate, then by affidavits from other attorneys in the community with similar experience stating their billing rate for similar clients. The relevant market rate for the determination of the reasonableness of an attorney fee request is the forum for the litigation. *Heath v. Department of Transportation*, 66 M.S.P.R. 101, 107 (1995); *Montreuil*, 55 M.S.P.R. at 690-91. For facility of discussion, we will address the agency's petition for review first.

The Agency's Petition for Review

¶10 With respect to the agency's challenges as to the administrative judge's findings regarding the reasonableness of the hourly rate of attorney fees requested

and the existence of an attorney-client relationship between the appellants and attorneys Kubicki and Saltzberg, we find that the record on these issues was adequately documented, and we agree with the administrative judge's findings on these issues, finding that the agency has not shown error in these findings. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Therefore, we find it unnecessary to further address these issues.

¶11 As to the reasonableness of the number of hours claimed by counsels, the agency contended below that the record was incomplete and did not establish that the hours expended were necessary, that description of functions for which hours were claimed was vague, and that functions were "lumped together," making it impossible to determine how much time was spent on each function. Casali Addendum File, Tab 9 at 10-12. The agency then challenged, inter alia, numerous specific claims by counsels as "unreasonable, unnecessary, duplicative, or other wise [sic] improper," and also objected to various claimed costs and expenses by counsels and the appellants, contending, inter alia, that some of those costs were unreasonable and/or were not incurred in the appeals. *Id.* at 12-26. The appellants filed individual responses for each counsel in opposition to the agency's arguments and in support of the requested fees and costs. Casali Addendum File, Tabs 13, 14, 17, 18, 20.

¶12 The administrative judge found in the addendum initial decision that the hours claimed by the appellants' attorneys, with the exception of certain hours claimed by attorney Kubicki, were properly documented and were reasonable, AID at 4-8, noting that "[t]hese cases were complex and required many hours of work through, inter alia, discovery, successful prosecution on appellant Casali's stay request, a lengthy hearing, and exhaustive settlement procedures at various stages throughout the proceedings," AID at 5. The administrative judge failed, however, to address the specific challenges made by the agency with respect to

the number of billable hours, costs, and expenses claimed by the appellants and their attorneys.

¶13 The burden of establishing the reasonableness of the hours claimed in an attorney fee request is on the party moving for an award of attorney fees.

Sailor-Nimocks v. Office of Personnel Management, 66 M.S.P.R. 438, 443 (1995). In submitting an attorney fee request, "[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.... Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 194 (Fed. Cir. 1986) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983)), *modified on other grounds*, 827 F.2d 761 (Fed. Cir. 1987). Thus, when a party files a motion for attorney fees, the administrative judge must determine "whether the hours claimed are justified" and must "make a judgment -- considering the nature of the case and the details of the request, taking evidence if need be, and defending his judgment in a reasoned (though brief) opinion -- on what the case should have cost the party who submitted the request." *Crumbaker*, 781 F.2d at 195 (quoting *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190, 1204 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985)); *see also Sailor-Nimocks*, 66 M.S.P.R. at 443-44; *Wise v. Tennessee Valley Authority*, 24 M.S.P.R. 166, 171 (1984).

¶14 While the administrative judge is not required to evaluate every billable entry in a voluminous record, he or she also need not automatically accept claimed hours. *See Crumbaker*, 781 F.2d at 195. An attorney fee request is to be reduced as necessary to disallow hours for duplication or padding. *Foley v. U.S. Postal Service*, 59 M.S.P.R. 413, 423 (1993). Thus, the amount of fees claimed is to be reduced where the record does not show that the expenditure of the claimed hours was necessary. *Wright v. Department of Transportation*, 53 M.S.P.R. 427, 433

(1992). In fact, the number of hours claimed may be reduced even when it is not outrageous or unprecedented but there is insufficient evidence to establish that it is reasonable. *Rose v. Department of the Navy*, 47 M.S.P.R. 5, 13 (1991). An administrative judge may not, however, reduce claimed hours without first providing the attorneys with an opportunity to address any deficiencies found in their billing statements. *See Wilson v. Department of Health and Human Services*, 834 F.2d 1011, 1012-13 (Fed. Cir. 1987). Further, the administrative judge must identify hours eliminated and give a clear explanation for their elimination. *Crumbaker*, 781 F.2d at 195; *Taylor v. Department of Justice*, 69 M.S.P.R. 299, 305 (1996).

¶15 Here, the agency's motion in opposition to the appellants' fee requests placed the appellants on notice of the agency's perceived deficiencies in their billing statements. They were provided with an opportunity to address the perceived deficiencies, and they availed themselves of that opportunity. *See Casali Addendum File*, Tabs 9, 13, 14, 17, 18, 20. In view of the specific challenges raised by the agency, we find that the administrative judge did not sufficiently scrutinize the number of hours claimed by the appellants' attorneys and did not sufficiently document his award of fees and costs.

¶16 Accordingly, we must remand these cases to the regional office for further adjudication with respect to the reasonableness of the claimed hours and costs, as well as for specific findings, in response to the agency's arguments, as to how legal work performed by attorneys Kubicki and Saltzberg "significantly contributed to the success of the Board proceeding and eliminated the need for work that would otherwise have been required in the Board proceeding." *Wiatr v. Department of the Air Force*, 50 M.S.P.R. 441, 446 (1991), *overruled in part on other grounds*, *Bonggat v. Department of the Navy*, 59 M.S.P.R. 175, 178-79 (1993); *see also McBride v. Department of Agriculture*, 3 M.S.P.R. 495, 497 (1980). On remand, the administrative judge may continue his adjudication of

these cases based on the existing evidence, or he may reopen the record. If necessary, the administrative judge may convene a hearing for the taking of additional evidence and argument.

Appellant Klipfel's Petition for Review

¶17 In her petition for review, appellant Klipfel contends that the administrative judge erred by inadvertently failing to address her request for attorney fees and costs incurred in connection with legal services rendered by attorney

Dickenson in her appeals. She contends that she requested attorney fees at a rate of \$300 an hour for 260 hours of work, for a total of \$78,000, plus costs of \$3,232.24 for attorney Dickenson's legal services. She contends that attorney Dickenson submitted separate fee requests and billings in her appeals and in appellant Casali's appeal. PFR File, Tab 4. The record supports appellant Klipfel's contention. *See* Klipfel Addendum File, Tab 1; Casali Addendum File, Tab 1.

¶18 A review of the addendum initial decision shows that, while the administrative judge consolidated appellants Casali's and Klipfel's cases for adjudication of attorney fee awards and stated in the addendum initial decision that the decision adjudicated attorney fee awards for both appellants, *see* AID at 1-2, it appears that the addendum initial decision did not address the attorney fee request for legal services performed by attorney Dickenson in appellant Klipfel's appeals. An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). If the fee awarded attorney Dickenson in the addendum initial decision was intended to also cover her fee request in appellant Klipfel's appeals, the addendum initial decision does not so clearly state.

¶19 The administrative judge is in the best position to evaluate documentation submitted by counsel to determine whether the amount of fees requested is reasonable and to evaluate the quality of representation provided by counsel and the complexity of the case. *Mullins-Howard*, 71 M.S.P.R. at 627-28; *Beall v. Department of the Interior*, 68 M.S.P.R. 231, 234 (1995). The fact that a case settles before a hearing does not require a different result. *Beall*, 68 M.S.P.R. at 234.

¶20 Accordingly, we must remand appellant Klipfel's cases to the Central Regional Office for further adjudication consistent with this Opinion and Order.

ORDER

¶21 On remand, the administrative judge shall, consistent with this Opinion and Order, readjudicate the reasonableness of the claimed hours and costs in both appellant Casali's and appellant Klipfel's cases. Consistent with *Wiatr*, the administrative judge shall make specific findings as to the significance of the contribution of legal work performed by attorneys Kubicki and Saltzberg to the success of the Board proceedings in these cases and as to how this work eliminated the need for work that would otherwise have been required in these cases. The administrative judge shall also adjudicate the reasonableness of the attorney fee request for legal services rendered by attorney Dickenson in appellant Klipfel's appeals. The administrative judge may continue his adjudication of these cases based on the existing evidence of record or may reopen the record for the taking of additional evidence and argument. If necessary, he may also convene a hearing. In making his determinations, the administrative judge shall take into consideration, inter alia, the quality of representation, the complexity of the appeals, and the necessity of the expenditure of hours and costs claimed,

including any duplication of legal services rendered.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.